90-1181

No. ____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES CAMPBELL and LOIS CAMPBELL as Co-Administrators of the Estate of Ronald J. Campbell, Deceased,

Petitioners,

v.

COLIN F. WHITE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH W. PHEBUS*
NANCY J. GLIDDEN
PHEBUS, TUMMELSON, BRYAN & KNOX
136 West Main Street
Urbana, Illinois 61801
(217) 337-1400

Attorneys For Petitioners

**Counsel Of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

I.

How should the phrase "but only when there is a governmental termination of freedom of movement through means intentionally applied," set forth by the Supreme Court in the case of *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed.2d 628, 109 S.Ct. 1378, 1381 (1989), be construed and applied in the context of an intentional arrest effected in a foreseeable but unintended manner through use of the intended means.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued October 24, 1990, and is included herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was issued on October 24, 1990. Because the resolution of the issue raised by

p[illegible]ioners turns on construction of the phrase, "but only when there is a governmental termination of freedom of movement through means intentionally applied," as set forth by the Supreme Court in the case of *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed.2d 628, 109 S.Ct. 1378, 1381 (1989), no petition for rehearing was filed. Pursuant to Federal Rules of Appellate Procedure 41(b), on November 13, 1990, petitioners filed for a Stay of Mandate pending this petition to the Supreme Court for a Writ of Certiorari. On November 15, 1990, the Court of Appeals issued a Mandate. On November 28, 1990, the United States District Court for the Central District of Illinois, Danville Division, entered an order and judgment dismissing petitioners' claims with prejudice (included herein as Appendix B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

The following statutes are set forth in Appendices D, E and F respectively:

Illinois Revised Statutes, Chapter 95-1/2, Paragraph 12-216.

Illinois Revised Statutes, Chapter 95-1/2, Paragraph 12-601.

Illinois Revised Statutes, Chapter 95-1/2, Paragraph 11-907.

BASIS OF FEDERAL JURISDICTION

The Complaint was originally filed in the United States District Court for the Central District of Illinois pursuant to 42 U.S.C., Section 1983, which provided jurisdiction under 28 U.S.C., Section 1331.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the matter came before the United States Court of Appeals for the Seventh Circuit as a collateral appeal from the trial court's denial of the defendant's motion for summary judgment.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below.

On July 7, 1986, Petitioners James Campbell and Lois Campbell, as Co-Administrators of the Estate of Ronald J. Campbell, deceased ("the Campbells"), filed a Complaint in the United States District Court for the Central District of Illinois, Danville Division. Count 1 of the Campbells' Complaint alleged a violation of 42 U.S.C., Section 1983, by Respondent Colin F. White, an Illinois State Police officer. ("Trooper White") Thereafter, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, Trooper White moved for summary judgment claiming, inter alia, that decedent's right to be free from unreasonable seizure was not violated inasmuch as decedent was never "seized" within the meaning of the Fourth Amendment, and because Trooper White's actions on the night in question were not unreasonable under the circumstances.

Oral argument on the motion for summary judgment was heard before the Honorable Judge Harold A. Baker of the United States District Court for the Central District of Illinois, Danville Division, on August 23, 1988. On January 11, 1989, Trooper White's motion for summary judgment was denied. Trooper White filed a Notice of Appeal January 12, 1989. Pursuant to a request for clarification made by the

United States Court of Appeals for the Seventh Circuit, on August 23, 1989, a formal order denying Trooper White's motion for summary judgment was issued. (Included herein as Appendix C). In the order, Judge Baker observed that, "the law about the use of excessive force to seize fleeing misdemeanants was so firmly established that no one reasonably could challenge that it applied to the activities of the defendant, Colin White." (Opinion at page 5, citing Section 9.2(d) of Lafave, *Search and Seizure*.)

The matter was next argued before the United States Court of Appeals for the Seventh Circuit on September 12, 1990. In a decision announced October 24, 1990, the United States Court of Appeals for the Seventh Circuit reversed the District Court's denial of summary judgment and remanded the cause with instructions that it be dismissed. The Court found, "our review of the record supports but one conclusion, that no seizure occurred within the meaning of the Fourth Amendment and that Officer White was entitled to judgment as a matter of law." (Opinion at page 5)

On November 13, 1990, the Campbells filed a Petition for Stay of Mandate Pending Application for Certiorari pursuant to Federal Rules of Appellate Procedure 41(b). The Petition was denied and a mandate was nevertheless issued by the Court of Appeals on November 15, 1990. Thereafter, on November 28, 1990, the District Court entered an order and judgment dismissing petitioners' claims with prejudice. (Included herein as Appendix B).

B. Statement of facts

At approximately 11:37 p.m. on May 25, 1985, petitioners' decedent and another motorcyclist were

operating motorcycles in an easterly direction on Interstate 72 in Piatt County, Illinois. Respondent, Trooper White, was sitting in his patrol car in the median strip of Interstate 72 when he observed the motorcyclists approaching in an easterly direction at a speed in excess of the posted 55 mile an hour limit.

The patrol car was equipped with a radio communication system, a siren, and had oscillating lights on the roof. All of the systems were operable. Trooper White radioed additional patrol cars in the vicinity to assist with apprehending the motorcyclists. He then initiated a high speed pursuit without the benefit of either oscillating lights or siren. The failure to engage the oscillating light and/or siren was a violation of Illinois law as set forth in Ill.Rev.Stat., Ch. 95-1/2, Paragraphs 12-216, 12-601.

Paragraph 12-216 provides:

> Operation of oscillating, rotating or flashing lights. Oscillating, rotating or flashing lights located on top of police vehicles in this State shall be lighted whenever a police officer is in pursuit of a violator of a traffic law or regulation. (Appendix D)

Paragraph 12-601 provides in relevant part with respect to authorized emergency vehicles that:

> [W]hen such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law in either of which events the driver of such vehicle shall sound such siren, whistle or bell, when necessary to warn pedestrians and other drivers of the approach thereof. (Appendix E)

Trooper White's vehicle reached a speed in excess of 100 miles per hour. The motorcyclists were unaware of Trooper White's presence in the median, or of the fact that they were being pursued. Trooper White lost sight of the tail lights of both motorcyclists as they entered a long sweeping curve.

At some point in the process of negotiating the curve, petitioners' decedent lost control of his motorcycle and traveled into the median. The motorcycle of petitioners' decedent came to rest in the median between the eastbound and westbound lanes of Interstate 72. Thereafter, petitioners' decedent in an effort to seek assistance stepped into the passing lane of the eastbound Interstate 72. As Trooper White passed another vehicle, which was traveling in an easterly direction on Interstate 72, he observed petitioners' decedent standing in the passing lane. Petitioners' decedent was thereupon struck by Respondent Colin White's patrol car and killed. At the time of impact, Trooper White's patrol car was traveling in the vicinity of 100 m.p.h.

Because Trooper White was proceeding without lights or siren, other motorists were not made aware of the urgency of the situation and they did not yield the right of way for Trooper White's vehicle to pass uninhibited. Under Ill.Rev.Stat., Ch. 95-1/2, Paragraph 11-907, the other motorist traveling in an easterly direction on Interstate 72 would have been required to yield the right of way to Trooper White's car had Trooper White utilized his flashing lights as required by statute. (Appendix F) The presence of the other vehicle in the driving lane of Interstate 72 at the scene of the occurrence prevented Officer White

from maneuvering his vehicle to avoid striking petitioners' decedent.

REASONS FOR GRANTING WRIT

I. PETITIONERS' DECEDENT WAS SEIZED IN VIOLATION OF HIS 4TH AMENDMENT RIGHTS AS MADE APPLICABLE THROUGH THE 14TH AMENDMENT WHEN, IN THE COURSE OF PURSUIT, HE WAS STRUCK BY RESPONDENT'S PATROL CAR WHICH WAS A MEANS INTENTIONALLY APPLIED TO EFFECT THE ARREST.

This Court has held that, "[w]henever an officer restrains the freedom of the person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7, 85 L.Ed.2d 1, 7, 105 S.Ct. 1694 (1985). At issue in *Garner* was the constitutionality of a statute which authorized the use of deadly force to apprehend a suspected felon. This Court unanimously concluded that the suspect in *Garner* had been "seized" in violation of the 4th Amendment. *Garner* involved the intended use of deadly force by officers, with a predictable outcome, in that the suspect was fatally shot. In *Garner*, a means intentionally applied brought about an intended result.

Similarly, in *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed.2d 628, 109 S.Ct. 1378 (1989), it was held that a fleeing suspect had been "seized" in violation of the 4th Amendment when, during the course of pursuit, his vehicle collided with a roadblock which had been erected by law enforcement officials. Writing for the majority, Mr. Justice Scalia noted that a 4th Amendment seizure occurs, "when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower*, 103 L.Ed.2d at 635, 109 S.Ct. at 1381. The Court in

Brower specifically declined to address the issue of an officer's subjective intent and reasoned, "we think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Brower*, 489 U.S. 593, 103 L.Ed.2d 637, 109 S.Ct. at 1382.

Petitioners' decedent was struck by respondent's patrol car in the course of pursuit embarked upon without benefit of siren or oscillating lights, in violation of state law. The pursuit was intentionally initiated by respondent in order to apprehend petitioners' decedent for an alleged violation of posted speed limits. It is respectfully submitted that respondent's patrol car was the instrumentality used to effect the arrest. The fact that the arrest was effected in a manner other than the manner intended should not be determinative of whether there occurred a seizure in violation of the 4th Amendment. As this court observed in *Brower*, "In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line. . ." *Id.*

Upon review below, the United States Court of Appeals for the Seventh Circuit focused on the subjective intent of respondent, Trooper White, finding that it was not his intent to apprehend petitioners' decedent by striking him with the patrol car. The Court determined that striking petitioners' decedent was not the, "means intentionally applied" to effect the stop. (Opinion at 5) Given this construction of the language as set forth in *Brower*, the Court held that no seizure had occurred. *Id.*

Petitioners respectfully suggest that both the majority in *Brower* as well as those concurring, recog-

nized the distinction which is at issue in this case—whether a means intentionally applied which yields an unintended result is nevertheless a seizure under the 4th Amendment.

In *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), this very distinction was addressed in the context of a police officer who drew his firearm as part of the arrest process and unintentionally discharged it, wounding the arrestee. The Court held that such action under appropriate circumstances may constitute a seizure by use of excessive force. Petitioners respectfully suggest that there can be no logical distinction between a firearm intentionally used with an unintended result and a squad car intentionally used with an unintended result where both were the instruments used to effect an arrest, which arrest was effected in a manner other than that manner specifically intended by the arresting officer.

In sum, the construction of the phrase, "but only where there is a governmental termination of freedom of movement through means intentionally applied" as used by this Court in *Brower v. County of Inyo*, was critical to the outcome of petitioners' case in the proceedings below. The phrase was heavily relied upon by the Court of Appeals in determining that petitioners' decedent had not been seized. This case will no doubt not be the only case, the outcome of which, turns on the construction of this very critical phrase. This case also presents facts which will enable the opinions expressed in *Brower* to be tested outside of their hypothetical context. As Mr. Justice Stevens observed in *Brower*, "decision in the case before us is thus not advanced by pursuing a hypothetical inquiry concerning whether an unintentional act might

also violate the Fourth Amendment." at 103 L.Ed.2d 638.

Petitioners respectfully suggest that Respondent, Trooper White, on the evening of May 25, 1985, intentionally engaged his patrol car in an effort to effect an arrest. That use of the patrol car led to an arrest effected in an unintended way, makes it no less of a violation of the Fourth Amendment rights of petitioners' decedent.

II. THE SEVENTH CIRCUIT'S OPINION IS IN CONFLICT WITH AN EARLIER OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS.

While *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), preceded *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed.2d 628, 109 S.Ct. 1378 (1989), it nevertheless presented a situation where the instrumentality intentionally used to effect an arrest resulted in an arrest in an unintended manner. As previously noted, in *Jenkins* the Fourth Circuit held that the plaintiff's complaint stated a cause of action under 42 U.S.C., Section 1983, for violation of the Fourth Amendment in using excessive force to effect a seizure.

In *Jenkins* the police officer drew and cocked his pistol and called on Jenkins to halt. Jenkins in fact halted. Thereafter, Jenkins was struck by a shot from the officer's gun. The officer contended that while he was lowering his gun, he accidentally pulled the trigger. The trial judge found that the officer did not intend to shoot Jenkins but that the officer was grossly or culpably negligent. However, the trial judge found against Jenkins as to his 1983 claim.

The Circuit Court of Appeals reversed this action of the trial court and remanded the case for entry

of judgment and reassessment of damages. In so doing, the Court noted, "[T]he injury in this case could be called 'accidental' only in the sense that it was not specifically intended; it was, however, the direct consequence of defendant's wanton conduct in the course of his attempt to apprehend the plaintiff." 424 F.2d at 1232. The Court went on to note that specific intent to injure was not a prerequisite to recovery under 1983.

Thus as early as 1970 the Fourth Circuit imposed liability for a government termination of freedom of movement through a means intentionally applied but having an unintended result. Defendants respectfully suggested that the key point is not the particular instrumentality used but rather whether an instrumentality intentionally employed to effect an arrest caused injury as a result of excessive force. Thus, the Seventh Circuit's opinion in this case is inconsistent with the Fourth Circuit's decision in *Jenkins v. Averett*. This inconsistency between appellate jurisdictions is further reason why the Supreme Court should entertain this appeal.

III. INJURIES AND DEATHS IN TRAFFIC ACCIDENTS ARISING OUT OF POLICE PURSUITS PRESENT A SUBSTANTIAL AND SERIOUS SOCIAL PROBLEM THAT SHOULD BE ADDRESSED BY THIS COURT.

Police pursuit involves the active attempt by a law enforcement officer to apprehend a fleeing suspect by operating the patrol car at significantly increased speed. In an article entitled, "High Speed Chases: In Pursuit of a Balanced Policy," Dr. Erik Beckman noted that high speed chases by law enforcement of-

ficers pose a serious threat to public safety.[1] Professor Beckman suggested that, in the context of a high speed chase, the use of a patrol car can constitute deadly force.

While much attention has been given to deadly force resulting from the use of the service revolver, correspondingly little attention has been given to deadly force brought about by the operation of the patrol car. The available data there is on the subject reinforces Professor Beckman's characterization of the seriousness of the issue.

For example, a U.S. Department of Transportation Study published in 1970 estimated that a minimum of 50,000 "hot pursuits" were undertaken nationally during the year studied. The "hot pursuits" resulted in an estimated minimum of 6,000 vehicle crashes, yielding 300-400 fatalities and in excess of 2,500 injuries. The study revealed 90 percent of the high speed chases were brought about by traffic infractions and the majority occurred at night.

Similarly, a 1982 California Highway Patrol Study revealed that high-speed chases of non-felons (presumably traffic offenders) resulted in accidents 30 percent of the time. The figure rose to 50 percent in high speed chases involving fleeing felons. Such high percentages of accidents and fatalities would be unacceptable if brought about by discharges of service revolvers. That the high percentages are instead brought about by the use of patrol cars should be at least as shocking to the sensibilities.

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[1] Beckman, E. (1983) "High-Speed Chases: In Pursuit of A Balanced Policy." The Police Chief (January) Vol. 50, No. 1 p. 34-37).

In their article entitled, "The Most Deadly Force: Police Pursuits," Professors Geoffrey Alpert and Patrick Anderson have noted that the patrol cars are generally an inseparable extension of the police officer.[2] They point out that aggressive police pursuits not only result in unnecessary loss of life, but are additionally responsible for serious injury and damage to property. Professors Alpert and Anderson ask, "Is occasional injury, death, or property damage the price we must pay to live in a democratic society?" They point out that this question must be borne in mind when creating police policy.

It is respectfully suggested that given the high incident of accidents and fatalities following high speed chases, concern for public safety requires that the issue of high speed chases be addressed by this court.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its judgment herein and upon review the decision of the Court of Appeals should be reversed and the cause remanded for further proceedings, including a trial on the merits, accompanied by an order clarifying that the result of an intentional act to arrest need not be intended in order for it to constitute a seizure.

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[2] Alpert, G. and Anderson, P. (1986) "The Most Deadly Force: Police Pursuits." Justice Quarterly (March) Vol. 3, No. 1 p. 1-13.

Respectfully Submitted,

JOSEPH W. PHEBUS*
NANCY J. GLIDDEN
PHEBUS, TUMMELSON, BRYAN & KNOX
136 West Main Street
Urbana, Illinois 61801
(217) 337-1400

Attorneys For Petitioners

**Counsel Of Record*

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1132

JAMES CAMPBELL and LOUIS CAMPBELL, as Co-Administrators for the Estate of Ronald J. Campbell, Deceased,

Plaintiffs-Appellees,

v.

COLIN F. WHITE,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 86-C-2161—**Harold A. Baker,** *Judge.*

ARGUED SEPTEMBER 12, 1990—DECIDED OCTOBER 24, 1990

Before WOOD and EASTERBROOK, *Circuit Judges*, and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.*

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* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

FACTUAL BACKGROUND

At approximately 11:37 p.m. on May 25, 1985, Illinois State Trooper Colin White was sitting in his squad car in the median of Interstate 72 when he observed motorcyclists Ronald Campbell and James Miller approaching in an easterly direction at a speed well in excess of the posted 55 mile per hour limit. Officer White began a highspeed pursuit of Campbell and Miller without the benefit of either oscillating lights or siren, reaching a speed in excess of 100 miles per hour. Campbell and Miller were apparently unaware of Officer White's presence in the median, or of the fact that they were being pursued.

Officer White subsequently lost sight of the taillights on the two motorcycles as they started into a long sweeping curve. During that period of time, Campbell lost control of his motorcycle, traveled into the median, and walked back onto the highway. As Officer White passed another vehicle, he suddenly observed Campbell standing in the passing lane. Although White attempted to avoid Campbell, his efforts were of no avail; Campbell was subsequently struck and killed.

PRIOR PROCEEDINGS

James and Lois Campbell, as co-administrators of Ronald Campbell's estate, filed suit against Officer White under 42 U.S.C. § 1983. Plaintiffs contended that Officer White violated the decendent's Fourth Amendment right to be free from unreasonable seizure when he struck and killed Campbell during the course of a high-speed pursuit which was conducted without the use of oscillating lights and siren in violation of state law.[1]

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[1] Ill. Rev. Stat. ch. 65½, para. 12-216 (1972) provided:

> Operation of oscillating, rotating or flashing lights. Oscillating, rotating or flashing lights located on top of police vehicles in this State shall be lighted whenever a police officer is in pursuit of a violator of a traffic law or regulation.

Officer White filed a motion for summary judgment under Fed. R. Civ. P. 56 contending that the decedent, Ronald Campbell, had not been "seized" within the meaning of the Fourth Amendment; that his high-speed pursuit of Campbell did not contravene a "clearly established" constitutional right; and that as a police officer acting within the scope of his employment he had a qualified immunity from suit. The district court addressed the issues raised by White in a series of collateral orders issued between January 11, 1989 and August 23, 1989, concluding in each that summary judgment was inappropriate. White appeals the denial of his Rule 56 motion.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." While our review of a district court's grant or denial of summary judgment is *de novo*, we view the record and all reasonable inferences which may be drawn therefrom in a light which is most favorable to the non-moving party. *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

On appeal, White renews the arguments that he made at the district court level, contending that Campbell had not been "seized" within the meaning of the Fourth Amendment; that his actions on the night of May 25, 1985 did not violate a "clearly established, sufficiently parti-

cularized" constitutional right; and that he was entitled to assert the defense of qualified immunity. We find the first issue dispositive, and accordingly limit our discussion to that issue.

The district court's analysis of Officer White's Rule 56 motion presumed the existence of a seizure, and focused on the question of whether White's actions were "objectively reasonable" under the circumstances. *See Graham v. Connor*, ___ U.S. ___, S. Ct. 1865, 1871-73, 104 L.Ed.2d 443 (1989). The court found that there had been a long-standing prohibition against the use of excessive force in the seizure of a "fleeing misdemeanant" such as Campbell and that a genuine issue of material fact therefore existed as to whether Officer White's high-speed pursuit of a mere traffic offender, absent the use of a siren or oscillating lights, was objectively reasonable. Concluding in summary fashion that there was no basis for White's claim of qualified immunity, the district court denied the motion for summary judgment.

To presume the existence of a seizure under the circumstances presented in this case ignores the distinction that has been made between an accidental or tortious act which happens to be committed by a government official and an intentional detention that rises to the level of a constitutional violation. *See Brower v. County of Inyo*, 489 U.S. 593, ___, 109 S. Ct. 1378, 1381, 103 L.Ed.2d 628 (1989) ("the word 'seizure'. . . can hardly be applied to an unknowing act"); *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) ("Collisions between police vehicles and others caused by police negligence clearly fall on the 'tort' side of the line").

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination

> of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*[2]

Id. (Emphasis in original). *See also Apodaca*, 905 F.2d at 1447 ("Only unreasonable *intentional* detentions violate the Constitution"); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 296 (8th Cir. 1989) (collision between police officer and another car did not constitute a seizure where officer did not intend for pursuit to end by means of an accident); *Jamieson v. Shaw*, 772 F.2d 1205, 1209-10 (5th Cir. 1985) (passenger in car stopped by roadblock was seized for constitutional purposes because officers intended to stop car by that means). Once plaintiffs have demonstrated the existence of a "seizure" they then must show that the seizure was objectively "unreasonable." *Graham v. Connor*, 109 S. Ct. at 1871-73; *Brower*, 489 U.S. at ___, 109 S. Ct. at 1382-83.

While it is clear that Officer White intended to stop Campbell and Miller for speeding and that White's actions caused, or contributed to, a "termination of [Campbell's] freedom of movement," there is no evidence whatsoever to suggest that White intended physically to stop or detain Campbell by running over him with his car in the event Campbell refused to pull over voluntarily. The collision between White and Campbell was not "*the means intentionally applied*" to effect the stop, but was rather an unfortunate and regrettable accident.[3] *See Apodaca*, 905

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[2] The fact that Campbell was not a "fleeing felon" (speeding is a misdemeanor offense) does not effect the outcome of our analysis. *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 296 (8th Cir. 1989).

[3] This case is thus factually distinguishable from both *Brower* and *Jamieson v. Shaw*, 772 F.2d at 1209-10, where police officers employed roadblocks which were "designed to stop by physical impact if voluntary compliance [did] not occur." *Brower*, 489 U.S. at ___, 109 S. Ct. at 1382.

F.2d at 1447; *Roach*, 882 F.2d at 297. Absent a seizure, a discussion of the reasonableness of Officer White's actions would be merely academic.

Our review of the record supports but one conclusion, that no seizure occurred within the meaning of the Fourth Amendment and that Officer White was entitled to judgment as a matter of law. The district court's denial of summary judgment is, accordingly, REVERSED and the cause REMANDED with instructions that it be dismissed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Order of the United States District Court for the Central District of Illinois, Danville Division

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CASE NUMBER: 86-2161

JAMES CAMPBELL, *et al*,

Plaintiffs,

v.

COLIN F. WHITE,

Defendant

FILED

NOV 28 1990

JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the mandate of the Court of Appeals in this case dated November 19, 1990, the case is dismissed with prejudice. Each party to bear its own costs.

November 28, 1990
Date

JOHN M. WATERS
Clerk

/s/ Sheryl L. Toler
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

86-2161

James Campbell, *et al.*,

Plaintiffs,

vs.

Colin F. White,

Defendant.

FILED

NOV 28 1990

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ORDER

Pursuant to the mandate of the Court of Appeals in this case dated November 19, 1990, the case is dismissed with prejudice. Each party shall bear its own costs.

Enter: this 28th day of November 1990

/s/ Harold A. Baker
Harold A. Baker
Chief United States District Judge

APPENDIX C

Order of the United States District Court for the Central District of Illinois, Danville Division

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 86-2161

JAMES CAMPBELL, LOIS CAMPBELL,
CO-ADMINISTRATORS OF THE ESTATE OF
RONALD J. CAMPBELL, DECEASED,

Plaintiffs,

vs.

COLIN F. WHITE,

Defendant.

FILED

AUG 23 1989

JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ORDER

This matter is before the court for hearing on the pending motions for summary judgment and for a specific ruling on the question of qualified immunity in compliance with the order of the Court of Appeals in this matter entered August 11, 1989. This court is embarrassed that the Court of Appeals was unable to deduce from the record what the nature of the case was, or the basis of the court's denial of the summary judgment motion for qualified immunity. The court accepts full responsibility for the opacity of the record.

It has been clear, however, at least since the amended complaint was filed, that the plaintiff's theory in this case is that the defendant violated Ronald Campbell's rights under the Fourth Amendment to be free from unreasonable seizure. The question that the case presents is whether, under all the circumstances of the occurrence which is the center of the litigation, the defendant, Colin F. White, used unreasonable force in attempting to seize, or in seizing, the person of Ronald Campbell.

The prohibiton against the use of excessive force in the seizure of a fleeing misdemeanant is not a novel rule of law. It originated in the common law and was codified January 1, 1962, in Ill. Rev. Stat. ch. 38 ¶ 7-5.[1] In *Tennessee v. Garner*, 471 U.S. 1 (1985), the general rule on the use of force that was recognized in the Illinois enactment was held to be the standard of reasonableness encompassed in the Fourth Amendment. *Id.* at 11,12. The *Garner* decision antedates the occurrence in this case by only a few months. But the statute was twenty-four years old and the common law rule has been established for centuries.

> The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages. To overcome the defense of qualified immunity, the plaintiff must show that the officials violated "clearly established statutory or constitutional rights of which a reasonable person would have known."

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[1] "However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistence or escape: and (2) The person to be arrested . . . has committed a forcible felony . . . . " Ill. Rev. Stat. ch. 38, ¶ 7-5.

> *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 83 L. Ed.2d 396 (1982).
>
> . . . .
>
> "[I]f there are issues of disputed fact upon which the question of immunity turns, or if it is clear that the defendant's conduct did violate clearly established norms, the case must proceed to trial." *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987).

Klein v. Ryan, 847 F.2d 368, 371 (7th Cir. 1988).

I find no merit in the claim that the defendant was not aware of the rule of law that forbade his use of excessive force in seizing a fleeing misdemeanant.

In addition, there are disputed facts upon which the reasonableness of the defendant's conduct turns. The facts that were agreed upon in the pretrial order and in the stipulation of facts filed on May 1, 1989, show that Ronald Campbell was operating a motorcycle in an eastbound direction on Interstate 72 in Piatt County, Illinois, on May 25, 1985, at about 11:37 p.m. Campbell was traveling at a high rate of speed, well in excess of the fifty-five mile an hour speed limit. The defendant, Colin F. White, was an Illinois State Trooper on patrol, parked in the median strip of Interstate 72, when Campbell passed. White set out to pursue and to seize Campbell. White did not activate his siren or his emergency lights. He accelerated the patrol car to a speed of 105 miles an hour. Campbell, for whatever reason, or at least no reason that I am able to say is undisputed at this point, rode the motorcycle down into the ditch in the median. There he was thrown from the motorcycle. Campbell then apparently walked back into the passing lane of Interstate 72 into the path of the oncoming state police car. Campbell was struck and killed. At the time, Campbell was wearing dark clothing.

The two very recent cases decided by the Supreme Court, *Brower v. County of Inyo*, No. 87-248, slip op. (Mar. 21, 1989), and *Graham v. Connor*, 109 S. Ct. 1865 (1989), stand for the proposition that in a Fourth Amendment seizure case, the test to be applied by the trier of fact is whether under all the circumstances the force that was used was reasonably necessary. The requirement is that the "governmental termination of freedom of movement be through means intentionally applied." *Brower*, slip op. at 4. What was in White's mind or his intentions to harm or not to harm Campbell are irrelevant. The test of reasonable force is one of objectively under all the circumstances.

The defendant's motion for summary judgment on the merits asks the court to decide as a matter of law that White's conduct was objectively reasonable. There are genuine issues, however, raised in the plaintiff's evidence about whether White's conduct was objectively reasonable. The plaintiff has presented expert opinion that the force was unreasonable and the defendant had not replied.[2] Under Rule 56 that renders the cas not ripe for summary judgment.

Returning to the question of qualified immunity, it seemed apparent to the court all through the case, after the amended complaint was filed, and based on the exchanges between the court and counsel, that this was a Fourth Amendment unreasonable seizure case and that there was no basis for the claim of qualified immunity. The court views the appeal as being without foundation. But that, of course, is not for this court to determine.

In its order of August 11, 1989, the Court of Appeals writes: "The district court was thereafter without authority to proceed to trial or to make further decisions con-

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[2] The plaintiff has some intense credibility questions associated with the evidence but they cannot be resolved summarily.

cerning summary judgment unless it first determined that the notice of appeal was frivolous or the right to appeal had been waived. *Apostle v. Gallian*, 870 F.2d 1335." The court made no such finding at that time. But I do now, and I did then, have the opinion that the appeal was without foundation and that the law about the use of excessive force to seize fleeing misdemeanants was so firmly established that no one reasonably could challenge that it applied to the activities of the defendant Colin White.[3]

It is ordered by the court that the defendant's motion for summary judgment on the basis of qualified immunity is denied. The defendant's motion for summary judgment on the basis of the depositions and other matters tendered to the court is also denied. Genuine issues of fact remain as to whether the actions of Colin White under all the circumstances were objectively reasonable.

The Clerk is directed to send a copy of this order, together with copies of the stipulation of facts, the pretrial order and all the other documents connected with the motions for summary judgment to the Clerk of the Court of Appeals.

ENTER this 23rd day of August, 1989.

/s/ Harold A. Baker
HAROLD A. BAKER
CHIEF UNITED STATES DISTRICT JUDGE

[3] But see § 9.2(d) LaFave, *Search and Seizure* for a discussion of force in a "stop" case. This is not a "stop" case. This is a case of seizure of a fleeing misdemeanant who committed his offense in the police officer's presence.

APPENDIX D

Illinois Revised Statutes
Chapter 95-1/2, Paragraph 12-216

ILLINOIS REVISED STATUTES, CHAPTER 95 1/2

12-216. Operation of oscillating, rotating or flashing lights

§ 12-216. Operation of oscillating, rotating or flashing lights. Oscillating, rotating or flashing lights located on top of police vehicles in this State shall be lighted whenever a police is in pursuit of a violator of a traffic law or regulation.

Formerly § 12-117. Renumbered § 12-216 by P.A. 77-37, § 1, eff. Jan. 1, 1972.

APPENDIX E

Illinois Revised Statutes
Chapter 95-1/2, Paragraph 12-601

ILLINOIS REVISED STATUTES, CHAPTER 95 1/2

12-601. Horns and warning devices

§ 12-601. Horns and warning devices. (a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning device shall emit an unreasonable loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway.

(b) No vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this subsection. Any authorized emergency vehicle as defined in Chapter 1 of this Act[1] may be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than 500 feet, but such siren, whistle or bell, shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law in either of which events the driver of such vehicle shall sound such siren, whistle or bell, when necessary to warn pedestrians and other drivers of the approach thereof.

Amended by P.A. 79-858, § 1, eff. Jan. 1, 1976.

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[1] Paragraph 1-100 of this chapter.

APPENDIX F

Illinois revised Statutes
Chapter 95-1/2, Paragraph 11-907

11-907. Operation of vehicles and streetcars on approach of authorized emergency vehicles

§ 11-907. Operation of vehicles and streetcars on approach of authorized emergency vehicles. (a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of this Code or a police vehicle properly and lawfully making use of an audible or visual signal,

(1) the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall, if necessary to merit the safe passage of the emergency vehicle, stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer and

(2) the operator of every streetcar shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer.

(b) This Section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

Amended by P.A. 83-781, § 1, eff. Jan. 1, 1984.